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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 357

GENERAL TELEPHONE COMPANY OF CALIFORNIA, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

No. 450

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1–A27)[1] is not yet reported. The opinion of the

[1] All appendix references herein are to that filed by petitioners in No. 357.

Federal Communications Commission (Pet. App. A30–A77) is reported at 13 F.C.C. 2d 448.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1969 (Pet. App. A27–A29). The petition for a writ of certiorari in No. 357 was filed on July 18, 1969. Petitioner in No. 450 was granted an extension of time within which to seek certiorari by Mr. Justice White, to and including August 8, 1969, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether construction by a common carrier of lines which distribute the signals of television and FM broadcast stations from the antenna or "head-end" site of a community antenna television system to the homes of the system's subscribers is subject to regulation by the Federal Communications Commission.

STATUTE INVOLVED

Pertinent provisions of the Communications Act of 1934, as amended (47 U.S.C. 151 *et seq.*) are set forth at pp. 2–3 of the petition in No. 357 and pp. 3–6 of the petition in No. 450.

STATEMENT

A community antenna television system (CATV) consists of three basic components: 1) the reception facilities which pick up, by means of high antennae or microwave transmission, signals transmitted by television and FM radio stations; 2) the "headend" apparatus which converts, modifies and modulates the signals

by electronic equipment so that the signals received can be transmitted along a coaxial cable; and 3) the coaxial cable distribution system which carries the converted signals to the households of the CATV subscribers (see Pet. App. A3). This third component, with which the instant cases are concerned, consists in turn of three parts: a) the trunk or "feeder" coaxial cable which begins at the head-end and carries the signal on the first leg of its journey; b) the distribution cable which carries the signal from the "feeder" line to the immediate vicinity of a subscriber; c) and the "drop-line" which carries it from the distribution cable to the terminal block on the subscriber's premises (see Pet. App. A4).

In the early stages of CATV development, distribution facilities were usually constructed by the CATV operator and operated as an integral part of the system. Increasingly, however, common carriers in the communications field have offered to provide distribution facilities for hire, connecting the head-end to terminal boxes in the subscribers' households for a fee paid by the CATV system.[2] These so-called "channel

[2] The record shows that as of March 14, 1967, six of the 33 operating companies of General Telephone and Electronics Corporation had completed or were in the process of completing construction of eight-channel distribution systems for use by CATV companies in ten communities and orders for four more had been accepted. As of March 1, 1967, the Bell Systems companies furnished such service to at least 178 separate communities or political subdivisions. United Utilities, Incorporated, the parent company of the United telephone operating companies, reported channel service operations in 31 communities; in 30 of these communities United Transmission, Incorporated, a wholly owned subsidiary of United Utilities, is

service" offerings are wholly separate and distinct from other communications services offered by the carriers, such as telephone, telegraph, facsimile or teletypewriter, and are not connected with any telephone exchange or toll service facility.

The present proceeding commenced in April 1966 when the Commission directed operating companies of Bell and General to file tariffs covering CATV channel service offerings.[3] In October, investigations were ordered into the lawfulness of the tariffs,[4] and in January 1967 similar inquiries were launched with respect to United's tariffs and other offerings filed by General.[5] These proceedings were expanded to include questions such as the applicability of Section 214 of the Communications Act, and all of them were consolidated.[6]

Subsequently, the Commission severed the question of the applicability of Section 214 for a separate hearing,[7] which resulted in the Decision and Order of

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the sole operator or a major stockholder in the CATV systems. Analysis of data submitted by the carriers shows that General invested $2,195,000 in channel service for just ten communities; United invested $821,609 in channel service for just six communities; Bell invested $1,360,000 in channel service for just four communities. Based upon a cost per mile of the distribution system, the record shows the investment cost of the then extant Bell channel service systems to be $43,240,019. The investment costs of the other systems is proportionate.

[3] See *Common Carrier Tariffs for CATV Systems*, 4 F.C.C. 2d 257.

[4] *California Water & Telephone Co.*, 5 F.C.C. 2d 229; *Associated Bell System Companies*, 5 F.C.C. 2d 357.

[5] *General Telephone System*, 6 F.C.C. 2d 434.

[6] *California Water & Telephone Co.*, 6 F.C.C. 2d 440.

[7] *California Water and Telephone Co.*, 7 F.C.C. 2d 571, 575. This action was taken in response to allegations by General and

June 26, 1968, now under review (Pet. App. A30–A77). Essentially, the Commission found that the CATV channel service furnished by the carriers constituted "a common carrier undertaking" to provide interstate service and that Section 214 certificates of public convenience and necessity were therefore required for construction of the necessary lines.

Upon review, the court of appeals unanimously affirmed the Commission's decision. Relying largely on this Court's opinion in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, the court below rejected the contention of the carriers that the service they render is intrastate in nature. "The stream of communication is essentially uninterrupted and properly indivisible," the court observed, and since the carriers, "by choice, inserted themselves as links in this indivisible stream [they] have become an integral part of interstate broadcast transmission" even though their physical facilities are located within a single State (Pet. App. A19, A20). Accordingly, the court agreed that the facilities involved formed part of an interstate "channel of communication" within the meaning of Section 214. Likewise, it upheld the determination that the exemption in Section 214 for local, branch and terminal lines was not intended to apply to new construction providing new customers with an entirely new kind of service. Finally, the court summarily rejected the contention that the

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California that insofar as the proceedings dealt with Section 214 matters, they were adjudicatory in nature and required the more formal procedures followed in making adjudicatory determinations.

facilities are entitled to the exemption provided for lines involved in telephone exchange service (Pet. App. A20).

ARGUMENT

Petitioners' chief contention is that the Commission's decision, upheld by the court below, exceeds its jurisdiction over interstate communications and improperly infringes on the authority of the States to regulate common carrier facilities and services which do not cross State boundaries (Pet. 9).[8] This argument raises no significant issue that was not considered by this Court in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, and does not warrant plenary review. Similarly, there is no substance to the claims that particular language of Section 214 exempts the services in question from the requirement of certification.[9]

1. In upholding the Commission's view that CATV channel service provided by common carriers is interstate in character, the court of appeals followed this Court's statement in *United States* v. *Southwestern Cable Co., supra,* 392 U.S. at 168–169:

> Nor can we doubt that CATV systems are engaged in interstate communication, even where, as here, the intercepted signals emanate from stations located within the same State in which the CATV system operates. We may

[8] Section 2(b)(1) of the Act (47 U.S.C. 152(b)(1)) excludes "intrastate communication service" from Commission jurisdiction.

[9] Petitioners in Nos. 357 and 450 raise substantially the same points. All references herein are to the petition in No. 357 unless otherwise specifically noted.

> take notice that television broadcasting consists in very large part of programming devised for, and distributed to, national audiences; respondents thus are ordinarily employed in the simultaneous retransmission of communications that have very often originated in other States. The stream of communication is essentially uninterrupted and properly indivisible. To categorize respondents' activities as intrastate would disregard the character of the television industry, and serve merely to prevent the national regulation that "is not only appropriate but essential to the efficient use of radio facilities." *Federal Radio Comm'n* v. *Nelson Bros. Co.*, 289 U.S. 266, 279. [Footnote omitted.]

See also *Idaho Microwave, Inc.* v. *Federal Communications Commission,* 352 F. 2d 729 (C.A.D.C.); *California Interstate Tel. Co.* v. *Federal Communications Commission,* 328 F. 2d 556 (C.A.D.C.). The carriers here perform some of the same functions as the CATV systems in *Southwestern Cable* and, as the court below concluded, their activities similarly form a part of this "stream of communication." The opinion below properly concluded that (Pet. App. A19):

> Any other determination would tend to fragment the regulation of a communications activity which cannot be regulated on any realistic basis except by a central authority; fifty states and myriad local authorities cannot effectively deal with bits and pieces of what is really a unified system of communication.[10] * * *

[10] *Pennsylvania R.R. Co.* v. *Public Utilities Commission*, 298 U.S. 170, on which petitioners rely (Pet. 13), is plainly

See *United States* v. *Southwestern Cable Co., supra,* 392 U.S. at 172–173; *National Broadcasting Co.* v. *United States,* 319 U.S. 190; *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U.S. 134.

Contrary to the petitioners' assertions, the certification requirement upheld below appears to have no impact whatever upon existing State regulatory programs. While many States do have statutory counterparts of Section 214 applicable to construction of facilities to be used solely for intrastate service, the record in the proceedings before the Commission does not show a single instance in which a carrier has applied for or been required to obtain a certificate of convenience and necessity from a State regulatory body before constructing facilities to provide channel service to CATV systems. Nor is the decision below, as the carriers suggest, a departure from established regulatory patterns. Under Section 214 carriers

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distinguishable. There, after mining and moving coal by its own barge line between two points within Pennsylvania, a coal company transferred the cargo to cars on its own railroad line which traveled along its private right-of-way, ultimately reaching the coal company's plant in Negley, Ohio. There the coal was processed and loaded aboard a common carrier railroad line for delivery to Youngstown, Ohio. This Court held (298 U.S. at 175) that the common carrier was rendering an intrastate service, deciding that the interstate transportation by the coal company could not be "tacked to the intrastate transportation" by the carrier so as to bring its service under the jurisdiction of the Interstate Commerce Commission. But here, as the authorities discussed above make clear, the broadcast signal is in continuous interstate communication and is subject to the Commission's regulatory power from its inception. *United States* v. *Southwestern Cable Co., supra,* 392 U.S. at 169.

have for many years been required to obtain certificates of convenience and necessity from the Commission for the construction of new lines within a single State for use in the transmission of interstate communications. See *Southwestern Bell Telephone Co.*, 6 F.C.C. 529, 532, decided in 1938. The instant case simply holds that this well-established jurisdiction of the Commission extends to cable lines used to distribute television signals as well as the more traditional kinds of communication. There is no indication that in the past this regulatory pattern has worked to "nullify conditions locally imposed" (Pet. 9), such as zoning and similar controls, and there is no reason to anticipate that it will do so in the future.

Petitioners argue (Pet. 10) that, although the decision below relates only to the construction of lines, it "also necessarily extends the Commission's jurisdiction to rates and to other aspects of common carrier service, again at the expense of State and local regulatory authority." The short answer is that neither the Commission's decision nor the opinion below deals directly with the regulations of charges, practices or services—matters which are presently pending before the Commission in proceedings that will in due course be open to judicial review.[11] Thus,

[11] In 1966 the Commission directed the carriers to file tariffs with respect to the channel service offerings. The carriers petitioned unsuccessfully for reconsideration, *Common Carrier Tariffs for CATV Systems*, 4 F.C.C. 2d 257, but did not seek judicial review at that time. Instead, the tariffs were filed and an investigation into their lawfulness begun. See the *Associated Bell Systems Companies*, 5 F.C.C. 2d 357, and *General Telephone System*, 6 F.C.C. 2d 434.

the raising of these questions now is premature. In any event, petitioners' contentions in this regard are without merit.

That Congress intended the Commission rather than the States to regulate charges and services involving common carriers' distribution of broadcast signals seems beyond dispute. Section 202(b) of the Act (47 U.S.C. 202(b)) provides that charges or services, stemming from "the use of common carrier lines of communication * * * in chain broadcasting or incidental to radio communication of any kind," fall under the jurisdiction of the Commission. In *Ward* v. *Northern Ohio Telephone Co.*, 300 F.2d 816, 819 (C.A. 6), certiorari denied, 371 U.S. 820, the court held that "[w]here lines * * * are furnished for broadcast purposes to a radio station by a telephone company, the telephone company is engaged in interstate communication, and is in interstate commerce, subject to federal law, even where all the property of the company is located within a single state." See also *Pacific Telatronics, Inc.*, 37 F.C.C. 1163; *Capitol City Telephone Co.*, 3 F.C.C. 189. The service rendered by the carriers here is plainly "incidental to radio communication," doing for the ultimate receiver of the communication essentially what the carrier in *Ward* did for the originator. In *Ward* the link was between the studio and the transmitter; here it is between the receiving antenna and the subscriber's premises, but there is nothing in this factor that would raise any novel question of Commission jurisdiction.

2. Petitioners' contentions that the construction of lines for CATV channel service falls within one or

more of several exemptions enumerated in Section 214 present no questions of substance. The court below gave appropriate deference to the agency's construction of its statute (see *Udall* v. *Tallman,* 380 U.S. 1), and to its conclusion that certification by the Commission would further basic statutory objectives (*Permian Basin Area Rate Cases,* 390 U.S. 747). Its determination that construction of the facilities in question is not exempt from the requirement of certification is clearly correct.

Section 214(a)(1) provides that no certificate shall be required for the construction, acquisition, or operation of a line within a single state "unless such line constitutes part of an interstate line." The term "line" is defined as "any channel of communication," and accordingly the court below could find a reasonable basis for the agency's holding that petitioners, being "an integral component in the indivisible dissemination system which forms an interstate channel of communication from the broadcaster to the viewer," are "part of an interstate line" and therefore not entitled to the 214(a)(1) exemption (Pet. App. A21).

Similarly, the court and the Commission properly concluded that the Section 214(a)(2) exemption for "local, branch, or terminal lines not exceeding ten miles in length" was limited to minor improvements or extensions of existing carrier facilities, with the purpose of obviating a continuous stream of burdensome applications for Commission approval. "It is reasonable to assume that Congress was not troubled by the prospect of a local telephone company running an extension line to a cluster of houses in a new sub-

division near existing facilities," but "[i]t is quite another matter to suggest that it meant to exempt a carrier's efforts to install an entire network consisting of 'trunk,' 'distribution,' and 'dropline' cables to provide TV service via CATV to an area that has theretofore been without such broadcast distribution facilities" (Pet. App. A24).

Finally, petitioner in No. 450 presses an exemption claim based on the exclusion in Section 221(b) of facilities "for or in connection with * * * telephone exchange service" (Pet. No. 450, 31–38). The court below properly agreed with the Commission's summary rejection of this contention as "inconsistent with the plain meaning of the words used" (Pet. App. A20–A21). Section 3(r) of the Act (47 U.S.C. 153(r)) defines *telephone exchange service* as "service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge." Clearly, CATV channel distribution service does not contemplate the furnishing to subscribers of "intercommunicating service" of the type usually identified with a telephone exchange.

3. Admittedly, Commission regulation of the type in question does not extend to CATV operators who construct their own facilities for reception and distribution or those who run their distribution cable over existing poles of utility systems pursuant to private contracts, since neither of these types of operation involves common carriage. Petitioners contend

(Pet. 11) that the decision below gives such CATV operators, who require no prior Commission approval to construct and operate their distribution facilities, an unfair competitive advantage over those operators who rely upon common carriers for distribution service because it will allow them to delay construction by competing systems by filing objections to the issuance of Section 214 certificates.

This claim is unrealistic, since competition among CATV systems for customers is quite uncommon. The Commission has found that CATV service has tended to develop on a "noncompetitive, monopolistic basis"; it is indeed for this reason that a combination of local, State and federal regulation has been and in all likelihood will continue to be required. *Amendment of the Rules and Regulations Relative to Community Antenna Television Systems,* 15 F.C.C. 2d 417, 425; see also Seiden, *An Economic Analysis of Community Antenna Television Systems and the Television Broadcast Industry,* p. 45 (1965). In any event, the Commission plainly has the power to protect its processes from being abused through the filing of dilatory claims.

In actuality, the Commission's certification procedure is far more likely to discourage than to give rise to unfair practices. One of the considerations that gave impetus to the Commission's assertion of Section 214 jurisdiction was the claim of CATV systems that the carriers have used their control of existing poles and conduits unfairly to the advantage of their corporate affiliates holding or seeking to obtain CATV franchises. See *National Community Television Ass'n,*

6 F.C.C. 2d 860. In several cases in which requests for certificates of convenience and necessity have been set for hearing, the Commission is inquiring into charges that the actions of the carriers *vis-à-vis* the CATV systems "are anti-competitive and monopolistic in nature, in contravention of the Communications Act or otherwise contrary to the public interest." *Manatee Cablevision, Inc.*, 34 Fed. Reg. 12919, 12921 (August 8, 1969); *TeleCable Corp.*, 17 F.C.C. 2d 517. The Commission's decision provides an administrative forum, heretofore lacking, where such claims can be heard and resolved.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

RICHARD W. MCLAREN,
Assistant Attorney General.

GREGORY B. HOVENDON,
Attorney.

HENRY GELLER,
General Counsel,

JOHN H. CONLIN,
Associate General Counsel,

LENORE G. EHRIG,
Counsel,
Federal Communications Commission.

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